

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
)
Plaintiff,)
)
)
v.) CAUSE NO. 1:17-cr-00021-TWP-DML
)
)
CRAIG NICHOLS,)
)
)
Defendant.)

**GOVERNMENT'S MEMORANDUM IN SUPPORT
OF ITS POSITION ON SENTENCING**

The United States of America, by counsel, Josh J. Minkler, United States Attorney for the Southern District of Indiana, and Tiffany J. Preston, Assistant United States Attorney, hereby files its Memorandum in Support of its Position on Sentencing the Defendant, Craig Nichols:

I. INTRODUCTION

Before he was indicted on February 14, 2017, Craig Nichols (“Defendant” or “Nichols”) had been the City of Muncie’s Building Commissioner since 2012, when Mayor Dennis Tyler appointed him to the position. Nichols is the son of Phil Nichols, an ex-councilman and former Democrat Party Chair of Delaware County. As set forth below, Nichols abused his position of public trust to steal from the citizens of Muncie until his crimes were detected, and he was forced to resign from office.

II. OFFENSE CONDUCT

Nichols’ criminal conduct is detailed in the Superseding Indictment that the Grand Jury returned on July 12, 2017. Ex. A. He is charged with seventeen counts of wire fraud, theft of government funds, and money laundering. Ex. A. As the Superseding Indictment makes

abundantly clear, and contrary to the Defendant's assertions, the defendant is not charged with Honest Services Fraud nor is he charged with having a conflict of interest. The Defendant is charged with abusing his position of public trust by engaging in bid rigging, and theft through wire fraud.

In summary, the Defendant intentionally prepared and caused others to prepare false and fraudulent documents and invoices so that he could 1) use his company Advanced Walls and Ceilings ("AWC") to steal \$81,500 from the City for demolition work that AWC never performed, 2) cover up his theft of \$81,500 by engaging in further document fraud and causing others to do the same, 3) concealing his ownership interest through fraud by creating a second company, Capitol Consulting and Property Management ("CCPM"), so that 4) Nichols could continue to engage in document fraud and bilk the City for asbestos inspection and abatement work that he either never performed, double billed, or performed at inflated prices.

But for an inquiry on November 4, 2015 (Exh. B), and the subsequent work of the Federal Bureau of Investigation, Nichols's crimes may have gone undetected. But, an exhaustive investigation exposed Nichols for what he is, a thief disguised as an honest public official.

A. How Honest Public Officials Are Supposed to Hire Contractors in Muncie

The City of Muncie (the "City" or "Muncie") is located in Delaware County, in the Southern District of Indiana. It is home to approximately \$70,000 tax paying citizens.¹ Muncie has many departments, including the Building Commissioner's Office, which is located in City Hall, and regulates permitting, inspections, and City code enforcement. The Muncie Board of Works ("BOW") is the governing board that requests, reviews, and approves quotes from

¹ This is according to the most recent census data.

contractors who wish to perform certain public works projects for Muncie through the Building Commissioner's Office.

The Muncie Sanitary District ("MSD") is a special unit of government created under Indiana State law by the action of an Ordinance of the City of Muncie. MSD carries out recycling, sanitation, utility billing, sewer maintenance, and storm water management functions for Muncie, among other responsibilities. MSD is governed by a three person Board of Sanitary Commissioners appointed by the Mayor (the "MSD Board") which acts as both the Executive Body and Fiscal Body of the MSD.

From 2012 until February 14, 2017 (when he was put on administrative leave), Nichols was the Building Commissioner for the City of Muncie. In his public role, Nichols had a duty to put the interests of the citizens of Muncie above his own financial gain. He didn't.

At times material to Nichols' indictment, Muncie had certain rules in place that were meant to ensure that its citizens were paying Muncie contractors for the best work at the lowest price. For example, before entering into a contract or agreement for a public works project that was expected to cost more than \$25,000, Muncie officials had to obtain at least three quotes from responsive contractors, and open and read aloud those quotes in a public forum. Upon declaration of an emergency, a department was allowed to contract for a public works project if they obtained quotes from at least two contractors known to perform the kind of work to be completed. In either scenario, the rules required the department to award the contract or agreement to the lowest responsive contractor who submitted a quote. The purpose of competitive bidding was to stimulate competition, prevent favoritism, and secure the best goods and services at the lowest practicable price, for the benefit of Muncie.

Nichols, given his position as Building Commissioner, was well familiar with Muncie's public works projects, and knew the competitive bidding rules. But, instead of following them, he exploited them for his own financial gain.

B. The Public Works Projects Scammed by Nichols

Beginning in or about 2014, MSD began a public works project to improve Muncie's levee system so that it could be recertified by the Federal Emergency Management Agency (the "Levee Recertification Project"). The Levee Recertification Project included plans to demolish homes and businesses along the White River to make way for the construction of new levees. MSD also conducted a multiyear project to separate the City's Storm water and Sewer Systems.

In or about April 2015, the Building Commissioner's Office (through the BOW) and the City of Muncie announced a multi-year public works project to redevelop a brownfield site located on the east side of Muncie called Kitselman Pure Energy Park (the "Kitselman Pure Energy Park Project"). The Kitselman Pure Energy Park Project involved the reclamation and redevelopment of a deserted manufacturing site and the expansion of the park through the acquisition of adjacent lots. Muncie partnered with a private developer, Gary Danner, and others, to complete the Kitselman Pure Energy Park Project. When Muncie conducted or sponsored demolitions, the Indiana Department of Environmental Management ("IDEM") required Muncie to show that the property to be demolished had been inspected for asbestos. In most cases, the identified asbestos must be abated by an Indiana-licensed asbestos abatement contractor.

As set forth below, Nichols abused his position as Muncie's Building Commissioner to scam the Levee Recertification and Kitselmen Pure Energy Park Projects for his own financial gain.

1. Nichols Steals \$81,500 in a Sham Demolition Scheme

When Nichols was appointed as the City's Building Commissioner, he was the registered owner and agent of AWC, a drywall company. After his public appointment, Nichols dutifully filed Uniform Conflict of Interest Disclosure Statements (Indiana Form 236) indicating that he had a financial interest in contracts awarded to AWC.² During the summer of 2015, Nichols fraudulently steered work to his own company (AWC) to demolish four properties that allegedly existed at 527 S. Elliott, 746 North Elm Street, 1000 North Wolf Street, and 439 South Proud Street.³ As the City's Buildings Commissioner, Nichols was required to obtain three, or arguably, at least two, bids to demolish the properties, but he intentionally failed to solicit any bids and simply awarded the work to himself.

Avoiding the competitive bidding process ensured that Nichols' company (AWC) would be awarded the "work." But, bypassing the bidding process was also a necessary part of his scheme. From the beginning, Nichols intended to bill Muncie to demolish structures that didn't exist. And, had contractors competitively bid on the four projects, they would have immediately discovered that there were no structures located at 527 S. Elliott, 746 North Elm Street, 1000 North Wolf Street, and 439 South Proud Street to demolish. But, given his powerful allies, Nichols figured that either no one would notice or no one would care, and he quietly submitted \$81,500 in invoices to the City between August 7, 2015, and October 5, 2015 for work he didn't perform.

² As set forth in more detail below, the defendant argues that his failure to file a similar conflict of interest form with CCPM negates his fraud because he wasn't required to do so with CCPM when it did work for Dannar, a private company. First, Nichols isn't charged with failing to file a conflict of interest form or even with having a conflict of interest. He is charged with document fraud. Nichols has admitted to intentionally failing to file the CCPM conflict of interest form because he was concealing his ownership interest in CCPM. That conduct is relevant to his state of mind and his numerous attempts to conceal his crimes--- and is not a charged offense or even an element thereof.

³ Nichols claims, without evidence, that Mayor Dennis Tyler told him to demolish the properties giving him license to scoop up the lucrative work without engaging in competitive bidding. The defendant has produced absolutely no evidence in support of that contention nor does the Mayor have the authority to override the competitive bidding process.

As set forth in the Superseding Indictment, and as shown in Exhibit C, Nichols submitted the following “first set of invoices:”

- 527 South Elliot (“the Elliott property”), dated July 30, 2015, for \$22,000, including the description, “1. Demolish all structures on property”;
- 746 North Elm Street (“the Elm property”), dated August 14, 2015, for \$18,500, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw”;
- 1000 North Wolf Street (“the Wolf property”), dated September 15, 2015, for \$21,500, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw”; and
- 439 South Proud Street (“the Proud property”), dated October 5, 2015, for \$19,500, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw”. (**Exh. C.**)

Importantly, Nichols submitted the AWC invoices one at a time, and over a period of several months (belying his claim that they were submitted in error). And, Nichols falsely claimed on the AWC invoices that the structures on the properties listed above were demolished in the summer and early fall of 2015, (again, belying his “mistake” defense”) when in fact, there were no structures on the properties to demolish, and AWC performed no work.⁴ Having been duped, Muncie issued the following checks that were drawn from Muncie’s City Account and deposited into AWC’s business bank account at Star Financial Bank:

- Check number 196956 in the amount of \$22,000, deposited on or about August 7, 2015,

⁴ It is incredulous to argue that this was a mistake. To accept that, the Court would have to believe that Nichols, over a period of months and on four separate occasions, “accidentally” claimed he had just demolished a building, when in fact, he had not engaged in any work at all. One would think that if this was truly a mistake, then Nichols would be able to point to four properties he actually DID demolish in the summer and early fall of 2015—but he can’t because he did nothing.

and endorsed by Craig Nichols (for the Elliott property);

- Check number 197211 in the amount of \$18,500, deposited on or about August 25, 2015, and endorsed by Craig Nichols (for the Elm property);
- Check number 197790 in the amount of \$21,500, deposited on or about September 18, 2015, and endorsed by Craig Nichols (for the Wolf property);
- Check number 198266 in the amount of \$19,500, deposited on or about October 9, 2015, and endorsed by Craig Nichols (for the Proud property);

Nichols deposited the checks, sat back, and hoped that no one would notice he just stole \$81,500 from Muncie. But, someone did notice. On November 4, 2015 (Ex. B), Les Marsh (concerned citizen/government watchdog) made a public records request for invoices related to the demolitions.⁵ It didn't take long for Les Marsh or anyone else to discover that as of the summer of 2015, there were no structures to demolish on the on Elliott, Wolf, Elm, and Proud properties.⁶ In other words, Nichols billed Muncie \$81,500 for doing absolutely nothing, and Les Marsh and others had figured it out.

Marsh's FOIA request also caught the attention of Audrey Jones, the City of Muncie Controller. (Exh. D, p. 14). As set forth in her recorded testimony, Marsh approached Jones and asked for copies of all AWC invoices to the City. Exh. D, p. 14. According to Jones, she gave Marsh copies of the original invoices, and then approached Nichols to inform him that she had turned them over. Exh. D, p. 14-15. Knowing that his theft had either already or was about to be discovered, Nichols panicked. Nichols lied to Jones, and immediately told her that the

⁵ Completely debunking Nichols' spurious claim that the crimes he demolished property in November and December to simply correct a mistake, rather than cover up his crime. The evidence shows that his crimes had already been detected, and he panicked.

⁶ Google Maps is an amazing crime fighting tool. It has a feature whereby one can review outdated street level and satellite imagery of locations previously photographed for Google Maps. Also, anyone living in Muncie at the time could have just driven by and discovered that the "demolitions" were bogus.

invoices he submitted (one at a time) in August, September, and October, had been “incorrect.”⁷

Jones believed him (even though she later suspected something was amiss, **Exh. D, p. 16**, “I mean, you get to thinkin’ about it, how could you make a mistake on four invoices...”), but she told him she couldn’t change what had already been entered into her computer. **Exh. D., pp. 14-16.** So, she asked Nichols to provide the corrected invoices.

Nichols then began in earnest to attempt to cover up his crime. According to metadata obtained from temporary files found during a search of Nichols’ computer (obtained via federal search warrant), there were two invoices that were last saved on November 5, 2015 (one day after the Marsh FOIA request). Those two invoices were among the “second set of invoices” mentioned in the Superseding Indictment in paragraphs 9 and 10. Additionally, and as addressed further below, Nichols sent a text message on November 4, 2015 to Cindy Burke, the tax preparer he enlisted to hide his ownership of CCPM, his other company, and said:

“That guy [believed to be Les Marsh] was up at the building raising hell want to know who the owner of capital consulting is so your name was given to him he may be trying to contact you just a heads up” **(Exh. E)**

In a clumsy effort to conceal Nichols’ sham demolition of the Elliott, Elm, Wolf, and Proud properties from Marsh and others, Nichols submitted a second set of false and fraudulent invoices to Muncie. In these invoices (the “second set of invoices”), Nichols intentionally altered the descriptions of the locations of the properties in the first set of invoices, by describing the locations of the properties by city block rather than by specific addresses.⁸ This wasn’t

⁷ Incidentally, Nichols’ claim that the invoices were merely incorrect is belied by the fact that he didn’t call attention to the “mistake” before November 4, 2015. In other words, he didn’t correct his alleged “mistake” before it was detected. He knew he was in trouble and honed in on precisely the four invoices (out of many) that he knew were bogus. Indeed, when Jones approached him, he didn’t even have to consult his own records before responding to her even though the FOIA request asked for all of his invoices. **Exh. D. p. 22.** He knew precisely which invoices were going to cause him trouble because he wasn’t correcting anything, he was covering it up.

⁸ This further belies his claim that the \$81,500 theft was just a simple mistake. If on November 5, 2015, he realized that his invoices were in error, then there should have been four properties already demolished in the summer and Fall of 2015 to which he could immediately point as demolished (hence, he put down the wrong addresses). But,

correcting an error—it was a sloppy attempt at a cover-up. Instead of describing the demolished structures by address, Nichols vaguely described them by city block so that no one could tell precisely which homes he was claiming he had demolished. That didn't satisfy anyone, including Jones (**Exh. D, p. 15**), and Nichols had to figure out a better way to hide his theft.⁹

Mistakes are corrected; crimes are covered up, and Nichols created a “third set of false invoices” (see Paragraph 11 of Superseding Indictment). The third set of invoices provided specific addresses that somewhat resembled the property descriptions in the first set of invoices (to lend legitimacy to the “mistake” defense), and matched the billed amounts precisely (so that they would equal \$81,500).¹⁰ This time, AWC actually demolished the structures listed in the third set of invoices.¹¹ But nevertheless, the invoices were false. In order to cover up the sham demolition of the structures in the first set of invoices, Nichols falsely claimed that the structures listed in the third set of invoices were demolished in the summer of 2015. But, they weren’t. The structures were actually demolished in late November/early December of 2015. Agents were able to interview several witnesses who observed the demolitions, and discovered records via subpoena showing when the power/water was turned off prior to their demolition, and when Nichols’ subcontracts rented dumpsters to remove the debris—all in November and December and not in the Summer/Fall as Nichols purported in the invoices.

that wasn’t the case because AWC didn’t demolish anything until November and December, 2015- *after* the Marsh FOIA request.

⁹ The defendant points to the meeting minutes from the February 16, 2016 BOW meeting in which Jones says that Defendant pointed out the mistake in October 15, 2016. However, a review of the actual board meeting recording makes clear that Jones told the BOW she could NOT remember the exact date. (Recording available via YouTube.) Jones was crystal clear in her recorded statement to the FBI that the corrected invoices came after Marsh’s FOIA request. **Exh. D.**

¹⁰ Defense claims that the invoices were similar, but ignores that one set of invoices did not have any similarity – with 746 N. Elm changing to 320 S. Beacon. Also, in this case, the corrected invoices listed the price incorrectly as \$19,500, when Nichols was actually paid \$18,500 for the Elm Phantom demolition.

¹¹ Hence, this is why the Government agreed to reduce the Defendant’s restitution since the Government does not dispute that these properties were demolished and needed to come down. However, that doesn’t negate the Defendant’s intent to steal \$81,500 nor does it impact the correct loss amount calculation which is the greater of intended loss or actual loss under the USSG 2B1.1.

In a panic, Nichols tried in earnest to give the \$81,500 he stole back to Muncie in the same way that a bank robber throws the cash he just stole from a bank at the police officers who are chasing him from the scene. Nichols doctored a third set of invoices and submitted them to Jones:

- 527 West Wilson, dated July 30, 2015, for \$22,000, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw”;
- 320 South Beacon, dated August 14, 2015, for \$19,500, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw”;
- 909 South Wolf Street, dated September 15, 2015, for \$21,500, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw)”; and,
- 424 South Proud St., dated October 5, 2015, for \$19,500, including the description, “1. Demolish all structures on property; 2. Remove all debris; 3. Backfill Lot; 4. Seed and Straw”.

But simply giving these doctored invoices wasn’t going to be enough in light of the public’s scrutiny. Nichols had to 1) explain why there was no bidding on any of the properties and 2) make it look as though the properties in the third set of invoices were demolished back in the summer and fall of 2015 when he first submitted the \$81,500. Nichols turned to his father for help. To lend legitimacy to the demolitions in the third set of invoices, Nichols asked Phil Nichols to help him obtain fraudulent quotes for the properties from another contractor. According to Muncie Street Superintendent Duke Campbell (who is a close friend of Mayor

Tyler and Phil Nichols), Phil or Craig Nichols asked Duke Campbell to find a contractor to submit a false bid for the demolition project so that Nichols' bids and prices would look legitimate. Campbell agreed. (Exh. G).

In December 2015, and according to their statements and testimony, Campbell called his nephew, Nick Gibbs of Gibbs Construction. (Exh. G and H). Campbell asked Nick Gibbs to provide emergency demolition quotes for the properties set forth in the third set of invoices. Again, an emergency project only requires two bids—so, if Gibbs agreed to provide the bogus and back dated quotes, then it would lend legitimacy to the “mistake” defense. (Exh. G and H). According to Gibbs, Campbell provided Gibbs with the addresses, the prices (to ensure that AWC’s bid was the lowest and to conceal that they were inflated), and dates to be included in the quotes (to conceal the \$81,500 theft and the fact that the properties were actually demolished in late 2015). (Exh. F and G). Campbell told Gibbs that it was a favor for Phil Nichols. (Exh. G and H). Gibbs knew that he wasn’t going to be awarded the work because the dates had already passed, but he trusted his uncle and, according to his testimony, he reluctantly gave Campbell the bogus quotes. (Exh. G and H).

Between February 20, 2016, and February 24, 2016, and according to Jones, Aaron Kidder (a consultant for the Mayor), the Mayor, Kidder, City Attorney John Quirk, Jones, Phil, and Nichols met on approximately four occasions at the Delaware County Democratic Party Headquarters to discuss how to address the issues with Nichols’ invoices. (Exh. D and I). According to Kidder, during one of the meetings at Democratic Headquarters, Nichols asked Kidder if he would be willing to say that he acquired quotes from Gibbs even though he had not. Kidder refused. (Exh. I).

On February 24, 2016, Nichols submitted the third set of invoices to the Muncie Board of Works during its regular meeting. The bogus invoices were legitimized by the false quote from Gibbs (see below):

Third Set of Invoices	Advanced Walls and Ceilings		Gibbs Construction	
	Date	Amount	Date	Amount
527 W Wilson	7/20/2015	\$ 22,000	7/17/2015	\$ 24,800
320 S Beacon	8/6/2015	19,500	8/7/2015	19,800
909 S Wolfe	9/8/2015	21,500	9/7/2015	23,600
424 S Proud St	9/28/2015	19,500	9/30/2015	21,850

Kissick submitted the invoices on or about February 24, 2016. The meeting was posted on a publicly available website. (See Def. Exh. 1). During the meeting, Kidder, who appeared on behalf of the Mayor's Office, asked the BOW to approve the four demolitions from the third set of invoices. Kidder also stated that the BOW had received copies of two quotes for each of the demolitions. Jones also spoke during the meeting. She told the BOW that, although she couldn't remember the exact date, in approximately October 2015, Nichols represented to Jones that the first set of invoices Nichols had previously presented to the BOW had incorrect addresses.¹² According to Jones, she had requested updated invoices from Nichols and told the Board that she filed them in the contractor's file when she received them. Jones made these statements to the BOW at Nichols' request, and because she was duped by Nichols into believing his lies. (Exh. D, pp. 24-25)

According to Kidder, after the February 24, 2016 meeting, Nichols asked Kidder to create fraudulent documents which would purport to be Muncie's request for quotes associated with the demolitions in the third set of invoices. (Exh. I). He refused. (Exh. I) Subsequently, Vicki

¹² The recording of the meeting is available online.

Veach (Director of Development) asked Kidder to attend yet another meeting with Phil Nichols, the Mayor, and Campbell. (Exh. I) During that meeting, Phil Nichols asked Kidder to create fraudulent documents which would purport to be requests for the quotes for the emergency demolitions in the third set of invoices. (Exh. I) Kidder again refused. (Exh. I)

According to Kidder, in or around March 2016, Nichols admitted to Kidder that the third set of invoices were false in that they were backdated. (Exh. I) Kidder told the Mayor, and according to Kidder, the Mayor neither said nor did anything in response. (Exh. I)

This was no mistake. Nichols committed a crime. He stole \$81,500, and only after he was caught, committed additional crimes to cover it up. Now, he is asking this Court to ignore his theft because he was willing (and able, given his political power) to induce and dupe others (Campbell, Gibbs, Jones, and though unsuccessful, Kidder) to conceal his crimes in a panicked and criminal effort to provide value for what he had stolen. As set forth in more detail below, neither common sense, nor the evidence, nor the Sentencing Guidelines support his argument which comes close to denying full acceptance of responsibility.

As set forth in more detail below, Nichols should be held accountable under Section 3553(a) and under the U.S.S.G. 2B1.1 for the intended loss arising out of his theft of \$81,500.

2. Nichols Engages in Money Laundering to Steal from Muncie

By the summer of 2015 (well before the BOW meetings discussed above), Nichols' work for the City had already been called into question by several citizens in Muncie who thought it disconcerting that Nichols' company (AWC) was being awarded work by the City. Nichols wanted to continue to do public works projects for Muncie, but had to distance himself. Enter

Cindy Burke—a local tax preparer who was also duped by Nichols as part of his criminal scheme.¹³

In or about June 2015, Nichols approached Burke who had been doing his taxes for years, and asked Burke to prepare registration papers for Nichols’ new company, CCPM. (Exh. E). Burke did not, as Nichols suggests, encourage him to create CCPM. (PSR, p. 9, para., 35, Exh. E). According to Burke, Nichols told her that he had been under media scrutiny arising out of his work with AWC for Muncie, and preferred to maintain his privacy with the new company. (Exh. E) Nichols asked Burke to register the company with the Indiana Secretary of State under her name instead of Nichols’, and at a P.O. Box instead of Nichols’ home address. She agreed. Burke registered the company as Nichols’ instructed, and accompanied Nichols to Star Financial Bank to open a business bank account. (Exh. E) The two opened a business bank account for CCPM, and listed both Burke and Nichols as signature authorities. (Exh. E)¹⁴ Nichols took possession of the CCPM checkbook and ATM card. Nichols instructed the bank to send statements to the P.O. Box (to which only Nichols had access), and not Burke. Then, Nichols took possession of Burke’s signature stamp so that he could use it to endorse checks he received from Muncie. (Exh. E)¹⁵

To further conceal his ownership interest in CCPM, Nichols turned to Leah Mullens, wife of Mike Kissik (AWC and CCPM employee). Mullens is Individual B in the Superseding Indictment. According to Mullens, Nichols instructed her to draft and respond to CCPM-related correspondence, obtain checks from the Muncie Controller’s office to CCPM and deliver them to Nichols, and to interact with CCPM’s subcontractors. Nichols paid Mullens \$100 in cash per

¹³ Ms. Burke cooperated with the Government immediately and is Individual A in the Second Superseding Indictment.

¹⁴ Additionally, there are numerous records corroborating her testimony.

¹⁵ These matters are included within the factual basis of the plea agreement.

house. (Exh. J). Further, Mullens told the FBI that Nichols sent E-mails from an E-mail account belonging to her, concealing his activity related to the company. He also instructed Mullens to drive to Muncie from another town to hand deliver checks from the Controller's Office, which was just down the hall from his own office at City Hall. (Exh. J).

Importantly, on November 4, 2015, right after Les Marsh asked for Nichols' invoices and after Jones approached Nichols about it, Nichols instructed Burke via text to:

"That guy [believed to be Les Marsh] was up at the building raising hell want to know who the owner of capital consulting is so your name was given to him he may be trying to contact you just a heads up" (Exh. E).

"No I would not tell him to leave at first he's probably going to ask you if you're the owner of capital you will say yes then he will probably want to ask you about your bid with the city you will say who are you and who do you represent and then your answer would be no you do not wish to discuss your business with him and have a good day" (Exh. E).

Finally, and in a further effort to conceal his ownership interest in CCPM, Nichols intentionally failed to file a Uniform Conflict of Interest Disclosure Statement indicating that he had a financial interest in contracts awarded to CCPM (even though he had done so for AWC).

Nichols was the de factor owner of CCPM, and the only person to withdraw cash from the company's bank account, but to most of the outside world, Burke owned the company. Now, Nichols was free to bid on public works projects from Muncie political departments (including MSD) and private companies (like Dannar) without drawing unwanted attention, and was free from scrutiny as he continued in his scheme to defraud.

3. CCPM's Work for the City of Muncie 507 S. Elliott (Count 5 of the Superseding Indictment)

In or about August 2015, CCPM, through Nichols, agreed to perform demolition work at 507 South Elliott, in Muncie. (Exh. A, Count 5, Plea Agreement, p. 11). Nichols reached out

to Barber Contracting (owned by Nichols' friend), and obtained a fraudulent quote. (**Exh. K.**) He also turned to his father for another favor. According to Duke Campbell, Nichols or Phil Nichols asked Duke to obtain a fraudulent quote from his other nephew, Richard Gibbs (brother of Nick Gibbs).¹⁶ (**Exh. L.**) Campbell approached Gibbs and instructed him to provide a quote for 507 S. Elliott, and told him to ensure that his bid was more than \$22,000. Gibbs also received a hand-written note on it with the Elliott address and "\$22,800." (**Exh. L, M.**) Richard Gibbs reluctantly agreed. (**Exh. L.**)

By design, CCPM's bid was the lowest and Muncie awarded them the contract:

Demolition Contractor	Amount
Capitol Consulting and Property Management	\$ 22,000
Barber Contracting	22,500
Richard Gibbs	24,400

CCPM subcontracted the work to RCM Construction and paid RCM \$14,000. On August 18, 2015, CCPM submitted a \$22,000 inflated invoice for the demolition of all existing structures located at 507 S. Elliott Street. The City of Muncie paid the invoice on or about August 28, 2015.

Notably, and as part of his Plea Agreement, Nichols had admitted to illegally concealing his ownership interest in CCPM, and that he procured the contract on the Elliott property invoice by bid rigging. (Plea Agreement, p. 11). Nichols has further admitted that he inflated the cost of the work on the invoice. (Plea Agreement, p. 11). Thus, Nichols has admitted to engaging in this part of his fraud scheme while he was also submitting the \$81,500 in AWC invoices for the sham demolitions.

¹⁶ Incidentally, Gibbs Construction was a concrete company and had never performed demolition work. Neither Gibb brother received compensation for what they did.

CCPM's Asbestos Inspection and Abatement Work for Muncie

As part of the Levee Recertification and Storm water Separation projects, MSD needed to demolish a number of structures. The Indiana Department of Environmental Management (IDEM) required the City to prove prior to demolition that the properties had been inspected for asbestos, and if found, abated. CCPM is not a licensed asbestos inspection and abatement company, but Nichols wanted to do the work anyway.

Nicki Grigsby, the District Administrator of MSD, was responsible for ensuring that the properties were inspected and abated, and for providing proof of same to the City so that they could be demolished. According to Ms. Grigsby, she randomly awarded the contract to CCPM after a CCPM employee (Mike Kissick) popped by her office and said that CCPM was interested in the work. (Exh. N.).¹⁷ Grigsby claimed that after her conversation with “Mike,” Nichols came to her office and told her that he was a “consultant” for CCPM, and confirmed that CCPM could perform the asbestos inspection and abatement work. (Exh. N.) According to Grigsby, John Quirk (the City attorney) told her that she didn’t have to put the project up for open bidding because CCPM was a consulting firm. (Exh. N.)

CCPM was awarded the asbestos and abatement work, and immediately subcontracted it to Air Management Techniques (“AMT” or “Company A” in the Superseding Indictment)—who was actually a licensed asbestos inspector and abatement company. Nichols’ scheme with respect to the abatement work was simple-- he submitted invoices for inspection and abatement work that either never occurred, or that did occur, but was either double billed or billed at inflated costs. For example, and as set forth in the Superseding Indictment, AMT reported that Nichols submitted invoices to abate properties in which AMT found no asbestos existed. On

¹⁷ Grigsby later changed her story and said that during the first demolition she coordinated, Nichols told her about the need to do asbestos work and that he was a consultant for CCPM who could do the work.

many other occasions, Nichols double billed Muncie by seeking payments for duplicate inspections performed on a single property.

Nichols also inflated the overall cost of the inspection and abatement work. He invoiced Muncie approximately \$187,000, but paid AMT \$56,720 (approximately 325% above market rate). (Exh. O). To give Nichols credit for the administrative costs that CCPM purportedly performed, the Government subtracted 40% of Nichols' subcontract costs from the total loss amount. Accordingly, and as set forth in the Government's loss calculation, the total actual loss to Muncie is \$107,592 which means that the City of Muncie paid CCPM 232% above market rate in inflated asbestos inspection and abatement work for the Muncie Asbestos and Abatement Job.¹⁸ (Exh. O). The Government's calculation of the loss amount will be further addressed below.

4. CCPM's Work at Kitselman Pure Energy Park

As set forth above, the Kitselman Pure Energy Park Project was a multi-year public works project to redevelop a brownfield site located on the east side of Muncie. The redevelopment was undertaken by an investor and businessman, Gary Dannar (Company B in the Superseding Indictment). The City agreed to fund half of the cost to demolish 15 homes in order to redevelop the site; Dannar would pay for the other half. The project was important politically. Indeed, and according to Kidder, Mayor Tyler instructed Kidder to obtain demolition quotes for several houses through Nichols in his capacity as Building Commissioner. (Exh. I). Nichols again saw an opportunity to rig the bidding process in order to ensure that CCPM would be awarded the work, and then planned to inflate the cost of the work. To accomplish that, Nichols

¹⁸ The Government in an effort to streamline negotiations agreed to give Nichols the benefit of the doubt on this calculation. Sadly, Nichols appears to only want to accept responsibility for the inspections he didn't conduct and for double billing. His sentencing argument completely ignores the drastic price gouging that took place as a result of his bid rigging and overbilling.

lied to Kidder, and said that he did not have an ownership interest in CCPM (which bid on the project). (Exh. I). Nichols also falsely told Kidder that he had solicited legitimate quotes from three companies which were presented to the BOW on or about October 28, 2015, as outlined in the table below:

Demolition Contractor	Amount
Capitol Consulting and Property Management	\$74,950
Richard Gibbs	\$87,700
RCM Construction, Inc.	\$225,000

As usual, CCPM was the lowest responsive contractor, and on or about October 28, 2015, the BOW awarded CCPM the contract. It was no coincidence that CCPM was the lowest responsive bidder. According to Richard Gibbs, Duke Campbell asked Richard to provide a fraudulent quote to help Nichols win the Kitselman bid. (Exh. L). Duke gave Gibbs the information he needed to draft the fraudulent quote, including the addresses to be demolished, the price for the demolition, and the date of the quote. (Exh. L). Once CCPM won the bid, Nichols inflated the cost of the work. Nichols later increased his invoice to accommodate asbestos removal and an additional demolitions.

In total, Nichols invoiced Muncie \$88,950 for CCPM's work at Kitselman Pure Energy Park, and invoiced Dannar \$74,950. Nichols defrauded both Muncie Dannar because 1) he used document fraud (Gibbs) during the bidding process to rig it so that CCPM would be awarded the work and 2) Nichols submitted false and fraudulent invoices to Muncie and Dannar for work he performed during the project.

C. Summary Of Offense Conduct

The offense conduct is simply egregious. Nichols was a public official who stole from the very people he was supposed to serve. When he got caught, rather than stand up and take

responsibility for his actions, he ensnared others to cover up his crimes not only to avoid prosecution, but also to ensure that his scheme to defraud the City could continue unabated. The public deserved better from Nichols, and a serious term of imprisonment is needed to reflect the egregious nature of the offense, promote respect for the law, and to deter other public officials.¹⁹

III. GOVERNMENT'S POSITION ON THE APPLICABLE SENTENCING GUIDELINE COMPUTATIONS

A. The Impact of the Plea Agreement

On July 19, 2018, the parties entered into a written plea agreement Government. As part of the Plea Agreement, Nichols agreed to plead guilty to Counts 5 and 26 of the Superseding Indictment. The parties stipulated to the base offense levels for Counts 5 and 26 (7 and 17, respectively) and stipulated that Nichols should receive a two-point enhancement for abuse of a position of public trust. The parties reserved the right to argue the appropriate calculation of the loss amount resulting from Nichols' scheme to defraud. The Government agreed to recommend a sentence at the low end of the applicable Guideline range as determined by the Court at sentencing *provided* that the defendant continued to fully accept responsibility for his crimes.

1. Government's Position on the Loss Amount

The parties do not agree on the loss amount under U.S.S.G. §2B1.1. It is the Government's position that the intended loss for Nichols' scheme to defraud is \$454,400, and that the actual loss is \$270,392.00 (**Exh. O**). A loss of either \$454,400 or \$270,392 (intended versus actual) yields the same increase to the base offense level— namely, a 12-point increase, because the loss exceeded \$250,000 but was less than \$550,000.

It is the Defendant's position that the loss amount for purposes of the Guidelines is between \$37,000 and \$99,450, or if the Court uses gain to calculate the loss, \$108,547. (PSR, pg. 21).

¹⁹ The Government will address the history and characteristics of Nichols, and other 3553(a) factors during the hearing.

The Sentencing Guidelines note that the Court need only make a reasonable estimate of the loss, and that the sentencing judge is in a “unique position to assess the evidence and estimate the loss based upon that evidence.” USSG §§2B1.1 Application Note (3)(C). The applicable standard is preponderance of the evidence. Here, the United States has provided evidence in the form of defendant’s own admissions, witness testimony, transcripts, and expert opinion in support of its loss calculation.

As set forth in **Exhibit O:**

1	NICHOLS			
2	SUMMARY - PLEA LOSS CALCULATION			
3				
4				
5		TOTAL TO	TOTAL TO	
6		CITY OF MUNCIE	SUBCONTRACTORS	TOTAL LOSS
7	Sham Demolitions	\$ 81,500.00	\$ -	\$ 81,500.00
8	507 S. Elliott	\$ 22,000.00	\$ 14,000.00	\$ 8,000.00
9	Wire Mill - City	\$ 88,950.00	\$ 49,100.00	\$ 39,850.00
10	Wire Mill - Dannar	\$ 74,950.00	\$ 41,500.00	\$ 33,450.00
11	Asbestos	\$ 187,000.00	\$ 79,408.00	\$ 107,592.00
12				
13	TOTALS	\$ 454,400.00	\$ 184,008.00	\$ 270,392.00
14		"INTENDED"		"ACTUAL"
15				
16				

The Government calculated the total loss amount by adding the following: \$81,500 (the total amount Nichols intended to steal from the City for the sham demolitions), plus \$22,000 for 507 S. Elliott, plus \$88,950 billed to the City for KPEP, plus \$74,950 billed to Dannar for the KPEP project, plus \$187,000 for the asbestos work that CCPM never performed, double billed, or billed at an inflated rate. (**Exh. O**). That yields an intended loss amount of \$454,400.

The Government believes that intended loss is the correct measure for the Court to consider. First, the committee notes to the U.S.S.G. state that to determine the loss under Section 2B1.1(b)(1), the Court should chose the “greater of actual loss or intended loss.” Intended loss means, “the pecuniary harm that the defendant purposely sought to inflict.” Committee note 3.

Given that all of AWC and CCPM's work was procured through fraud (bid rigging), and that Nichols then further defrauded the City, MSD, and Dannar by padding his invoices or billing for work that his companies didn't perform, the intended loss should be considered by this Court. Put another way, Nichols never would have been able to bill the City, MSD, Dannar, or anyone, had he not engaged in bid rigging. He should be held responsible for the entire amount of \$454,400.

Alternatively, the Government has provided its calculation of the actual loss amount. Actual loss amount is defined by the reasonably foreseeable pecuniary harm that resulted from the offense. Committee Note 3. To calculate the actual loss, the Government subtracted the amount of money Nichols paid to his subcontractors (\$184,008), and gave Nichols an overly generous credit for the cost of CCPM's administrative services. The end result is an actual loss amount supported by the evidence and an expert opinion—namely, an actual loss amount of \$270,392.²⁰

Here, intended versus actual loss is a distinction without much of a difference. If the Court finds that the intended loss is \$454,400, then the offense level is increased by 12. If instead, the Court decides that the actual loss amount is the more appropriate measure (which also happens to be the gain), then the \$270,392 figure also yields a 12-point increase.²¹

Using either metric, it is the Government's position that the base offense level should be increased by 12 points under Section 2B1.1((b)(1)(G) because the loss amount exceeded

²⁰ Gain is a third option, but only if the Court cannot make a reasonable estimate (which it can, given the evidence and Brater's expert opinion). In that case, the gain is measured by the total amount billed to the City, minus what Nichols paid to subcontractors. That amount is also \$270,392.

²¹ Indeed, the United States has given the defendant the benefit of the doubt regarding the value of CCPM's administrative services further reducing the loss amount. What results is a more than fair and reasonable conclusion that Nichols is responsible for at least \$270,392 out of the \$454,400 he billed in total to the City and Dannar. (Exh. O).

\$250,000, but was less than \$550,000. The basis for the Government's calculation is set forth in more detail below.

i. Nichols Should be Held Accountable for the Full \$81,500.

This Court should hold Nichols accountable for the total amount billed as part of Nichols' sham demolitions because the evidence overwhelmingly establishes that Nichols stole \$81,500 from the City, and that Nichols' post-detection attempt to call it a "mistake" was a criminal attempt at a cover-up.

This was no mistake—this was a crime. Nichols submitted four invoices, one at a time, over a period of months, totaling \$81,500 to be paid for work he knew he didn't do. In other words, Nichols submitted four different invoices, over a period of months, each alleging that he had just demolished a property and that Muncie owed him payment for doing so. Perhaps the Court could accept Nichols' defense if he had submitted the invoices in bulk, or even, for example, if he could point to four properties that he did indeed demolish in the summer and fall of 2015. But, that's just not what happened.

Not-so-coincidentally, each of the four invoices Nichols submitted that he is now claiming were merely "incorrect" happened to be vacant lots. Perhaps the Court could accept that one of the invoices had an incorrect address—but it belies common sense to suggest that all four invoices had not only incorrect addresses, but also all just-so-happened to be vacant. A true clerical error on four separate invoices would certainly lead to at least one occupied lot or indeed, a non-existent property. His defense is a desperate attempt to avoid responsibility.

Additionally, for Nichols' arguments to hold water, the evidence would have shown that he would have hired a subcontractor to inspect the homes for asbestos before demolishing them.

Since Nichols' intended to steal the \$81,500 from the beginning, there is no evidence of inspection prior to demolishing the homes on any of the false invoices.

Additionally, had Nichols made a mistake as he suggests, why commit crimes to cover it up? After Les Marsh submitted his FOIA request on November 4, 2015, Nichols knew that four invoices Marsh received from Jones were outright lies, and that a simple google search would reveal that Nichols had billed the City for \$81,500 to demolish properties on vacant lots. When Jones approached Nichols to notify him of Marsh's request—he didn't have to search his records—he knew immediately he was in trouble and concocted a ridiculous lie that the four invoices were merely "incorrect." (Exh. D). Expecting the heat, Nichols scrambled, and contacted Cindy Burke via text message on November 4, 2015, to remind her to lie and say she was the true owner of CCPM in case anyone popped by the office and asked her. (Exh. E).

And then, rather than "correct" the invoices, he committed document fraud by doctoring four invoices (the second set of invoices) to show demolitions that occurred on four unidentified properties on a street block. When that didn't work, he went further. He sought the assistance of his father and Duke Campbell to coerce others to submit false and fraudulent, backdated invoices to paper the file to make it appear as though 1) that the demolitions did in fact occur 2) that they occurred in the Fall and Summer of 2015; and 3) that the project was bid on an emergency basis. None of that was true. Nichols panicked, and in a criminal attempt to provide value for the \$81,500 he stole post detection, he demolished four properties in November and December, and submitted the false and fraudulent third set of invoices to try and make his "mistake" appear legitimate.

The Court should not reward Nichols for engaging in criminal behavior to cover up his theft. Nichols admits that he did demolish four homes that were dilapidated in November and

December. In other words, his argument boils down to—"no harm no foul." But there was harm and there was foul, and the evidence overwhelmingly shows that Nichols stole \$81,500 from the City. That Nichols was willing to engage in additional fraud to conceal his theft is something for which he should be punished, not rewarded.

Finally, the notion that Nichols made a mistake is completely contradicted by his admissions in the Plea Agreement. Count 5 alleges that Nichols committed wire fraud on August 28, 2015--- the exact time period during which he submitted the four bogus AWC invoices. Nichols admits that he instructed contractors, such as Gibbs, to submit false and fraudulent quotes to demolish the property at 507 S. Elliott, and that he (Nichols) submitted inflated invoices as part of that project. And yet, Nichols is asking this Court to believe that while he was engaging in document fraud to enrich himself through the Elliott contract, his submission of \$81,500 to the City was unintentional and above board.

a. Nichols' Criminal Efforts to Doctor the Second and Third Sets of Invoices and to Demolish Properties in November and December is a Post-Detection Cover up

Nichols argues that he should receive a credit against the loss of \$81,500 because he attempted to "correct a mistake" before it was detected.²² The U.S.S.G. committee notes make clear that a defendant is only entitled to credit against the loss if Nichols returned the money to the victim before the offense was detected. The time of the detection of the offense is the earlier of the time the offense was discovered by a victim or government agency; or the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency. The evidence runs completely contrary to Nichols'

²² It appears from the PSR that Nichols would like to receive FMV or Gain credit for a total loss amount of between \$15,000 to \$29,000. The PRS and Nichols initially confused (the Final PSR corrected the confusion) the \$52,500 credit that the United States agreed to give Nichols in restitution for the four demolished properties in November and December. Restitution is wholly different from calculating the intended or actual loss amount.

defense. As set forth previously, this was no mistake. This was a theft. And in contrary to Nichols' assertions, his criminal efforts to cover up his theft were done post-detection.

Here, the evidence showed that Les Marsh made his FOIA request on November 4, 2015.

(Exh. B). Audrey Jones brought the request to Nichols' attention the same day. (Exh. D). Metadata on Nichols' computer shows he created or saved the second set of invoices on November 5, 2015, and Jones said he provided the second set of invoices after Marsh's request.²³ It wasn't until much later that Nichols provided the third set of invoices for the November and December demolitions that were only performed because Nichols had been caught. Those invoices were submitted to the Board in February 2016—long after detection. Nichols' desperate attempt to avoid increasing the applicable loss amount by \$81,500 (thus, increasing his exposure under the Guidelines) is completely negated by the evidence and comes dangerously close to failing to accept full responsibility for his actions.²⁴

You can't rob Peter to pay Paul and then ask the Court to give you credit for your criminal ingenuity. Put another way, if Nichols had robbed a bank, went home, enjoyed the proceeds, and then only after the police questioned him tried to sneak into the bank at night to return the money to the vault—he has still committed bank robbery. Nichols should be held accountable for his actions under the Guidelines and under 3553(a).

²³ Defendant cites the BOW minutes from February 2016 in support of his assertion that Jones said he brought the mistake to her attention in October 2015. But, the recording of the meeting makes clear that the meeting minutes were incomplete. Jones said during the meeting that she actually wasn't certain of the date. What Jones has been certain about from the beginning is that she had no discussions with Nichols about the need to correct the invoices until AFTER Marsh's November 4, 2015 FOIA request.

²⁴ The Government has the right under the plea agreement to present evidence and argument concerning the defendant's acceptance of responsibility, and the Government's recommendation of a low-end sentence is tied to his full acceptance of responsibility for the offense. Given the enormous weight of the evidence contradicting Nichols' claims, the Government is questioning Nichols' full acceptance of responsibility.

ii. Nichols Should be Held Accountable for the Intended or Actual Loss Associated with 507 S. Elliott, the Wire Mill Project, and the Asbestos Inspection and Removal Scam

a. Intended Loss

As set forth above, the Government calculated the total loss amount by adding the following: \$81,500 (the total amount Nichols intended to steal from the City for the sham demolitions), plus \$22,000 for 507 S. Elliott, plus \$88,950 billed to the City for KPEP, plus \$74,950 billed to Dannar for the KPEP project, plus \$187,000 for the asbestos work that CCPM never performed, double billed, or billed at an inflated rate. (Exh. O). That yields an intended loss amount of \$454,400. For the reasons set forth above, the Government believes that intended loss is the correct measure for the Court to consider, and Nichols should be held responsible for the entire amount of \$454,400.

b. Actual Loss

Alternatively, and as set forth above, the Government has provided its calculation of the actual loss amount. To calculate the actual loss, the Government subtracted the amount of money Nichols paid to his subcontractors (\$184,008), and gave Nichols an overly generous credit for the cost of CCPM's administrative services. The end result is an actual loss amount supported by the evidence and an expert opinion—namely, an actual loss amount of \$270,392.

Economist Ross Brater's Expert Analysis of Nichols' Inflated Demolition Invoices

Nichols is taking the untenable position (even though he admitted to price inflation in Count 5) that he didn't inflate his demolition prices. The Government has attached the report of Ross Brater, an Economist with the Antitrust Division of the United States Department of Justice, in support of its position that Nichols substantially inflated the cost of demolishing MSD properties that he obtained via bid rigging. (Exh. P). Mr. Brater's education and experience are

set forth in his curriculum vitae. His report, opinions, and the basis for those opinions are also attached as **Exhibit P.**

If called, Mr. Brater would testify consistent with his opinions set forth in his report. The entirety of Mr. Brater's report is attached, but given its length and complexity, the Government directs the Court's attention to his opinion as set forth on page 1—namely, that had the contracts for the 21 structures been competitively bid instead of awarded to Nichols through fraud, it would have cost the Muncie taxpayers between \$8,800 and \$9,200 on average to demolish each property. (**Exh. P, p. 1, 5-7**). Instead, Nichols (according to his own calculation) billed on average \$19,500 per property. (PSR, p. 15).

Unlike the defendant's analysis, which is addressed further below, Mr. Brater conducted a scientific, statistical analysis by comparing Nichols' invoices for the 21 structures to similar structures demolished in the City of Muncie that were competitively bid. (**Exh. P.**).²⁵ As set forth in Table 3, page 6, Mr. Brater limited his comparison to properties demolished only in the City of Muncie in 2015 (Specifications 3 and 4), and accounted specifications that impact the cost of demolition such as above grade square footage, whether the home had a basement, and the square footage of the basement. Accordingly, his comparison yields the most reliable and reasonable estimate of Nichols' inflation because it compares like properties, during the same time period, and in the same location. (**Exh. P.**).²⁶

Nichols obtained the contracts by fraud, and they weren't competitively bid. On top of that, Nichols inflated the cost of the work. As a result, it cost Muncie \$267,400 when it should have been much less.

²⁵ Brater, in Table 1, also compared the City of Muncie demolitions to all MSD bid projects. That cast a wider net, and returned an \$11,000 mark up on average.

²⁶ The 21 properties Mr. Brater analyzed are in Table 4. They include what he billed for the sham demolition to aid in his analysis. But, to be clear, the United States is seeking full responsibility as it pertains to the loss amount for those properties (\$81,500).

In summary, the United States has provided a scientific analysis by a qualified economist to support its conclusion that Nichols inflated the cost of demolishing the MSD properties. Accordingly, the Court has much more than a reasonable estimate on which to rely.

Defendant's Analysis is Flawed

Defendant's analysis is unreliable and self-serving. Defendant averaged the cost of what Nichols billed to MSD and Muncie for the demolished properties. That average, set forth on page 15 of the PSR, was \$19,500. It then compared Nichols' average cost to demolish the structures to the "Hardest Hit Program" allowances. That is not a reliable comparison. First, the Hardest Hit Program was an allowance given after the 2008 housing crisis to assist communities that needed to demolish abandoned properties. Regulations stipulated that cities could use the Hardest Hit Allowance to demolish structures without a basement for \$15,000, and with a basement for \$25,000. In other words, the allowance was the ceiling, and not the floor. Further, the Hardest Hit allowance only factored in whether the property has a basement or not. It did not factor in, as Mr. Brater did, other critical factors such as 1) location; 2) above grade square footage 3) the size of the basement; and 4) year of demolition.

What results is that the Defendant's analysis is a self-serving apples to oranges comparison of his demolition costs versus the allowance given by the Hardest Hit Program to the State of Indiana. And, most importantly, his analysis ignores what the market would have demanded had the contracts to demolish properties of similar square footage and specifications (basement or not, basement square footage) been bid in 2015. Accordingly, the defendant's analysis is flawed, not based on expert opinion, and the Court should discredit it, and accept the expert opinion of Mr. Brater.

iii. Nichols Should be Held Accountable for Defrauding Dannar

The Defendant further attempts to escape any responsibility for 1) obtaining the KPEP work by fraud and 2) inflating the cost of the buildings he demolished that were paid for by Dannar. Nichols argues that he can't be held accountable for his fraud against Dannar because he had no obligation to file a conflict of interest form given that Dannar is a private entity. That makes no sense. Nichols is charged with wire fraud and money laundering. That he failed to file a conflict of interest form is only relevant to show his intent to hide his ownership interest in CCPM. It doesn't negate that he obtained the KPEP work by fraud and then inflated the costs to *both* the City and Dannar. Using any definition, that's still wire fraud.

Defendant further argues that Dannar's opinion that he believed Nichols' prices were fair is also misleading. (PSR, p. 19). During his interview, Mr. Dannar made clear to the FBI that he based his opinion on Mark Peters' conclusion. (Exh. Q). In his interview, Mark Peters made clear that that his company had no role in selecting the demolition contractor other than a cursory review of the expected amount. Instead, the City of Muncie was responsible for selecting CCPM as the demolition contractor. (Exh. R).

iv. Nichols Should be Held Accountable for his False and Inflated Asbestos Invoices

As set forth above, Nichols used his sham company CCPM to obtain asbestos inspection and removal work as part of the Levee Recertification and Storm water Separation projects. CCPM was not a licensed asbestos inspection and abatement company, but Nichols wanted to do the work anyway.

CCPM was awarded the asbestos and abatement work, and immediately subcontracted it to AMT—who is actually a licensed asbestos inspector and abatement company (and thus, whose prices should be a reliable and reasonable barometer for what Nichols should have billed MSD).

Nichols submitted invoices for inspection and abatement work that either never occurred, or that did occur, but was either double billed or billed at inflated costs. For example, and as set forth in the Superseding Indictment, AMT reported that Nichols submitted invoices to abate properties in which AMT found no asbestos existed. On many other occasions, Nichols double billed Muncie by seeking payments for duplicate inspections performed on a single property. Nichols also inflated the overall cost of the inspection and abatement work. He invoiced Muncie approximately \$187,000, but paid AMT \$56,720 (approximately 325% above market rate).

(Exh. O).

To give Nichols credit for the administrative costs that CCPM purportedly performed, the Government subtracted 40% from the total loss amount to account for these costs. Accordingly, and as set forth in the Government's loss calculation, the total actual loss to Muncie is \$107,592 which means that the City of Muncie paid CCPM 232% above market rate in inflated asbestos inspection and abatement work. **(Exh. O).**

Defendant's Refuses to Accept Responsibly for his Inflated Invoices

Defendant argues that he should only be held responsible for the asbestos invoices he completely fabricated (for work he admits he never performed) and for the work he double-billed. That's akin to a drug dealer who will only admit to the amount of drugs officers seized from his car even though the evidence overwhelmingly shows he is running a drug trafficking enterprise. The defendant bases his argument on Nikki Grigsby's statement that after she stopped using CCPM, she paid more to another company to perform for asbestos inspection and abatement. That argument is also misleading. First, Grigsby admitted that she was over her head and wholly unqualified to ascertain how much was a reasonable cost to inspect and abate asbestos. **(Exh. N.)** Second, after MSD stopped using CCPM, they changed their contractual

requirements. As set forth in Exhibit S, MSD began splitting the bidding between inspection and abatement. Contractors who wished to bid for the inspection (the non-lucrative part of the job) were now not allowed to bid for abatement (the lucrative part of the job). In years past, there was no such prohibition, and the inspection job typically acted as a “loss leader” . . . which effectively reduced the price of the inspection. Indeed, AMT chose to stop bidding for MSD inspection work because it recognized that abatement work was the only way to make a profit.

(Exh. T).

The evidence overwhelmingly supports the Government’s calculation of the applicable loss amount under the Sentencing Guidelines. The Court should hold Nichols fully accountable for his crimes, and increase his base offense level by 12 points.

2. **Enhancement for Sophisticated Means**

Finally, the parties disagree regarding whether Nichols should receive a two-point enhancement for sophisticated means. It is the Government’s position that the evidence supports beyond a preponderance finding that Nichols’ scheme to defraud displayed a greater level of planning or concealment than a typical fraud of that kind. Nichols’ scheme to defraud, as outlined in the Superseding Indictment, included bid rigging, document fraud, insurance fraud, creating a fictitious entity to conceal his ownership interest, and concealing the illegal proceeds of his ill-gotten gains. “[S]ophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” U.S.S.G. § 2B1.1(b)(10)(C) app. n. 1. Using fictitious entities and corporate shells to hide assets and transactions ordinarily constitutes sophisticated means, id., although those examples are “not exhaustive and merely suggest[] the wide variety of criminal behavior covered by the guideline,” *United States v. Wayland*, 549 F.3d 526, 528 (7th Cir. 2008). For purposes of

subsection (b)(10)(C), “sophisticated means” also includes conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts. Here, the Defendant’s crimes, and the concealment of his crimes, had numerous layers of sophistication, which as discussed above, he organized and led, and thus were reasonably foreseeable to him.

Nichols engaged in a number of sophisticated methods to cover up his scheme and to prevent the public from knowing that he was still engaging in business deals with Muncie. First, he engaged in layers of document fraud to conceal his theft from the City (see above). He solicited several others to also engage in document fraud by creating false bids (which required created fake documents). When Nichols wanted to continue to receive public works projects from Muncie after his ethics had been called into question, he created CCPM. Nichols efforts to conceal his ownership interest in CCPM were directly related to proceeds of a specified unlawful activity, namely, wire fraud and theft of government funds. His methods were sophisticated and required a great deal of coordination, knowledge, and planning.

In order to create CCPM (a fictitious entity), Nichols used an intermediary--Cindy Burke. He duped Burke into preparing registration papers for CCPM, asked Burke to register the company with the Indiana Secretary of State under her name instead of Nichols’, and at a P.O. Box instead of Nichols’ home address. He convinced Burke to open a business bank account in both their names. To ensure concealment and access to the ill-gotten gains, Nichols took possession of the CCPM checkbook and ATM card, and instructed the bank to send statements to the P.O. Box (to which only Nichols had access), and not Burke. Then, Nichols took possession of Burke’s signature stamp so that he could use it to endorse checks he received from Muncie.

But that's not all Nichols did to further his scheme, Nichols turned to Leah Mullens to draft and respond to CCPM-related correspondence, obtain checks from the Muncie Controller's office to CCPM and hand deliver them to Nichols who literally worked right down the hall from her, and to interact with CCPM's subcontractors. Finally, and in a further effort to conceal his ownership interest in CCPM, Nichols intentionally failed to file a Uniform Conflict of Interest Disclosure Statement indicating that he had a financial interest in contracts awarded to CCPM (even though he had done so for AWC).

Nichols engaged in so many efforts to conceal his offenses. His scheme required layers of fraudulent activity, complicated ways of avoiding discovery, and numerous individuals to carry it out. This was all a complex scheme that was designed to distance Nichols from CCPM. Nichols knew he couldn't get away with stealing more money from MSD unless his ownership interest in CCPM was concealed. He should be held accountable for lengths to which he was willing to go to commit his crimes.

In sum, the offense conduct here "displays a greater level of planning or concealment" than the typical fraudulent embezzlement or kickback scheme. *See Green*, 648 F.3d at 577 ("Here, the defendants' overall scheme lasted three years and involved numerous complex fraudulent transactions, the creation of fake documents, and the participation of nearly twenty individuals."). Nichols should receive the two-point enhancement.

IV. CONCLUSION

For the aforementioned reasons, the United States respectfully requests this Court apply a 12-point increase for the loss amount, and the two-point increase for sophisticated means. The United States further asks this Court, under Title 18, United States Code, Section 3553(a), to sentence this defendant to a lengthy term of imprisonment that accounts for the nature and

circumstances of his offense, his history and characteristics, and that promotes respect for the law, deters Nichols and others from committing similar crimes, and provides just punishment to the citizens of Muncie.

Respectfully Submitted,

JOSH J. MINKLER
United States Attorney

By: s/ Tiffany J. Preston
Tiffany J. Preston
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on January 16, 2019, a copy of the foregoing was filed electronically.

Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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